

FEDERAL COURT OF AUSTRALIA

Kaur v Minister for Immigration and Border Protection [2016] FCA 556

Appeal from: *Kaur & Ors v Minister for Immigration & Anor* [2015] FCCA 3533

File number(s): VID 2 of 2016

Judge(s): **BUCHANAN J**

Date of judgment: 20 May 2016

Legislation: *Federal Court Rules 2011* (Cth), rr 1.61, 1.61(1), 1.61(5), 36.03, 36.03(a)(i)
Migration Act 1958 (Cth), s 97

Cases cited: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152
Trivedi v Minister for Immigration and Border Protection (2014) 220 FCR 169

Date of hearing: 5 May 2016

Registry: Victoria

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: No Catchwords

Number of paragraphs: 37

Counsel for the Appellants: The first and second appellants appeared in person and on behalf of the third appellant

Solicitor for the First Respondent: Ms L A Helsdon of Sparke Helmore Lawyers

Counsel for the Second Respondent: The second respondent filed a submitting notice

ORDERS

VID 2 of 2016

BETWEEN: **RAJWINDER KAUR**
 First Appellant

JAGROOP SINGH
Second Appellant

CHARANJOT SINGH CHAHAL
Third Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **BUCHANAN J**

DATE OF ORDER: **20 MAY 2016**

THE COURT ORDERS THAT:

1. 1. The appeal filed on 4 January 2016 be dismissed.
2. 2. The interlocutory application filed on 4 January 2016 be dismissed.
3. 3. The appellants pay the first respondent's costs, as taxed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BUCHANAN J:

Preliminary matters

1 1 The first respondent asserts that the appellants require an extension of time of five days to prosecute their appeal, and oppose any such extension. I do not agree that an extension of time is necessary.

2 2 The judgment of the Federal Circuit Court of Australia (“the FCCA”) which is under appeal was given on 9 December 2015. A notice of appeal was filed on 4 January 2016.

3 3 The timing of the present appeal to this Court was governed by r 36.03(a)(i) of the *Federal Court Rules 2011* (Cth)

36.03 Time for filing and serving notice of appeal

An appellant must file a notice of appeal:

- (a) within 21 days after:
 - (i) the date on which the judgment appealed from was pronounced or the order was made; or

...

4 4 However, r 1.61 provides:

1.61 Calculation of time

- (1) A period of time for doing an act or thing fixed by these Rules or by an order of the Court is to be calculated in accordance with this rule.

...

- (5) If the time fixed includes a day in the period starting on 24 December in a year and ending on 14 January in the next year, the day is not to be counted.

5 5 The appeal was within time.

6 6 Another issue which requires no independent attention is an interlocutory application by the appellants that the first respondent be restrained from giving effect to the judgment of the FCCA, pending hearing of the appeal to this Court.

7 7 The appellants are in Australia. Their appeal has been heard. The interlocutory application has no ongoing significance and will be dismissed.

Background

8 8 The three appellants are wife, husband and son. They are nationals of India. The first appellant made an application for a Skilled – Graduate (Class VC) (subclass 485) visa on 27 July 2011, nominating her skilled occupation as cook. She gave details of an IELTS (International English Language Testing System) language test taken on 18 September 2010, including the test reference number.

9 9 The details given did not match the records held in the IELTS databases. In particular, the test report form number returned no match. The first appellant was, on 29 June 2012, invited to comment on the possibility that she had provided, or caused to be provided, a “bogus document” which might cause her to fail to meet the requirements of PIC (public interest criterion) 4020, a necessary criterion for the grant of a visa. She was given 28 days to respond but did not do so.

10 10 A “bogus document” is a term defined in s 97 of the *Migration Act 1958* (Cth). It is a document that the Minister reasonably suspects is a document that:

- (a) (a) purports to have been, but was not, issued in respect of the person; or
- (b) (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) (c) was obtained because of a false or misleading statement, whether or not made knowingly.

11 11 PIC 4020 requires that there be no evidence before the Minister that a visa applicant had given, or caused to be given, a bogus document in relation to the application for a visa.

12 12 On 21 September 2012, a delegate of the Minister refused the visa application as the delegate was not satisfied that the IELTS test report form was genuine. The delegate concluded, therefore, that a bogus document had been supplied in connection with the visa application and PIC 4020 was not satisfied.

13 13 It is not necessary that a visa applicant be shown to be compliant in the specific content of a bogus document, if it is otherwise apparent that the document is affected by

purposeful falsity (*Trivedi v Minister for Immigration and Border Protection* (2014) 220 FCR 169).

14 Although subsequent decision-makers are not bound by the reasons of the delegate, those reasons serve to put a visa applicant on clear notice that the issues to which those reasons refer will be issues on any review (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [35]).

The Migration Review Tribunal

15 The appellants, on 9 October 2012, made an application to the Migration Review Tribunal (“the MRT”) to review the decision of the delegate.

16 The appellants were invited to attend a hearing at the MRT on 4 June 2014, but did not do so. A telephone call was made to their nominated representative who, according to a note in the MRT’s records, informed a member of the MRT staff that the first appellant “had decided not to attend this hearing”.

17 On 6 June 2014, the MRT then wrote to the appellants, through their nominated representative, and invited comment about the potentially bogus nature of the IELTS test report form, and its significance for the requirements of PIC 4020. There was no comment or other information provided by the appellants.

18 The MRT concluded on 4 July 2014:

Bogus document

...

19. In the absence of any response or explanation from the applicants, and in light of the information on the IELTS verification records that there was no match found for the test report form that was submitted to the Department in support of the applicant’s visa application, the Tribunal reasonably suspects that the IELTS test report form 10IN041633TR122G, as given by the applicant to the Department in relation to this visa application, purports to have been but was not issued in respect of her and is therefore a bogus document within the meaning of s.97(a) of the Act. Alternatively the Tribunal reasonably suspects that that the IELTS test report form 10IN041633TR122G as given by the applicant to the Department in relation to this visa application is counterfeit and is therefore a bogus document within the meaning of s.97(b).

20. The Tribunal therefore finds that there is evidence that the applicant has given a bogus document to the Minister in relation to her visa application. It follows that the Tribunal is not satisfied that there is “no evidence” that a bogus document has been given to the Minister or the Tribunal and therefore

the applicant does not meet PIC 4020(1).

...

Secondary applicants

26. The delegate also refused visas to the secondary applicants, the partner and child of the visa applicant and who are included in her application.
27. There is no claim or any evidence before the Tribunal that the remaining applicants meet the primary criteria for the grant of the visa. In addition, to meet clause 485.321, the secondary applicant must be a member of the family unit of a person who, having satisfied the primary criteria, is the holder of a subclass 485 visa. As the applicant does not satisfy the primary criteria for a subclass 485 visa, or any other subclass, the Tribunal finds that the secondary applicants also do not satisfy clause 485.321 and, therefore, the criteria for a subclass 485 visas, or any other subclass.

The Federal Circuit Court of Australia

19 19 The appellants then made an application for judicial review to the FCCA, on 31 July 2014. To succeed, it would be necessary to show that the MRT had made a jurisdictional error. The grounds of the application were:

1. I have applied for a skilled (Provisional)(Class VC) visa under s.65 of Migration Act 1958 (the Act) on 27.07.2011 with my Husband Mr. Jagroop Singh and son Master Charanjot Singh Chanal, with relevant documents. The delegate refused to grant the visa on 21 Sept 2012 on the basis that I did not satisfy the requirements of cl.485.224 of schedule 2 to the migration regulations 1994 (the Regulations).The delegate was not satisfied that I did not met Public Interest Criterion (PIC)4020.
2. I have applied to MRT to reconsider the decision made by the delegate, at the time of making application, I nominated the occupation of a Cook, and I had IELTS exam result as well but I don't know what happened exactly and delegate said that there was no result contained within the IELTS verification system for me for the test.
3. Delegate sent me letter on 29 June 2012 asking about to verify the test report no. 101N041633TR122G, As I have given exam through IELTS centre only I didn't have anything else apart from result.
4. I request honourable authority to please consider my application and grant me time so that I can collect the documents and can present documents before honourable justice.

20 20 Those grounds do not identify, or suggest, any jurisdictional error.

21 21 An affidavit filed in support of the application for judicial review said only:

1. I am giving all true and correct information and documentation.

2. I am genuine applicant and wish to reconsider my application.

22 22 The application for judicial review was heard on 9 December 2015. The FCCA said in its judgment (*Kaur & Ors v Minister for Immigration & Anor* [2015] FCCA 3533):

15. The grounds do not point to anything remotely resembling a jurisdictional error. They appear to seek merits review. This court is not permitted to provide merits review.
16. Before the court today, the first applicant said that she had tried to get documents from India but had been unsuccessful. I note that she claimed to have done the IELTS test in 2011 [sic]. She has had four years to get documents from India if that is what she wished to do. The applicant also told the court today that she has no proof, apparently meaning no proof that the document that she provided was a genuine document, rather than a bogus document.
17. I have considered the tribunal's decision-making process and reasons. I have been unable to discern any jurisdictional error in them. The tribunal appears to have given the applicants ample opportunity to comment on and respond to the apparent position that the IELTS report submitted by the applicant was a bogus document.
18. The applicants did not take that opportunity. They did not attend the tribunal hearing. All in all, it seems to me that there is no basis upon which it could be said that there is a jurisdictional error in this case. Consequently, the application must be dismissed.

23 23 Those findings appear to me, with respect, to have been inevitable on the material before the FCCA.

The appeal

24 24 The appellants have now appealed to this Court. Their grounds of appeal are:

Grounds of appeal

1. That the Judge erred in dismissing the appellants' application filed on 31 July 2014 without considering that fact that PIC 4020 was invoked arbitrarily without any basis in law and fact.
2. The Judge erred in not considering the fact that that PIC4020 cannot be applied retrospectively.
3. The Judge erred in not considering that findings of fraud and deception is necessary to attract PIC4020 pursuant to the case of *Trivedi v Minister for Immigration and Border* [2014]FCAFC 42
4. The appellants' application for an extension of time and notice of appeal clearly raises an arguable case in so far as PIC4020.
5. That the Judge erred in dismissing the review and not according substantial

justice to the applicants.

25 25 No written submission in support of the appeal was filed as directed.

26 26 However, the first and second appellants both appeared on the appeal (representing their own interests and that of their son) and made what appeared to be genuine attempts to explain their situation, perhaps better described as their dilemma. They did not require the use of an interpreter and each appeared to me to have no difficulty understanding and responding in English.

27 27 If it was a matter for me (which it is not) I would have no doubt about their present competence in the English language.

28 28 Unfortunately for their appeal, the matters which they sought to explain cannot overcome the legal difficulties which their appeal faces.

29 29 They explained that an IELTS test was taken by the first appellant in India because it was less expensive for them. They relied on the integrity of the test provider. They could not explain why the test form did not match the database records and were at a loss to know (then and now) how the first appellant's test might be proved to be genuine.

30 30 They had not appeared before the MRT to attempt to explain the position because their migration agent advised them that the attempt would be futile. A further migration agent advised the application to the FCCA. They pursued the present appeal, I infer, in some hope that a resolution might be found.

31 31 I am in no position to assess whether the explanation given by the first and second appellants should be accepted, so far as the application of PIC 4020 was concerned. That was an explanation that should have been given to the MRT for its assessment (and to the delegate before that). Whatever view was taken about the application of PIC 4020, it would appear on the material before me that each of the delegate and the MRT would have been justified, in any event, in refusing to accept the IELTS test form in support of the visa application, with the result, I assume, that a visa would not in any event then have been granted.

32 32 One of the consequences of refusal of a visa because of PIC 4020 is that a further application for a visa cannot be made for three years. That period has now passed.

33 33 However, none of the matters to which I have referred raise any matter which improves the appellants' position on the present appeal. It is only the present appeal with which the Court may deal.

34 34 The grounds of appeal themselves are misconceived. They identify no error by the FCCA. They identify no jurisdictional error by the MRT.

35 35 On the material before the MRT, and having regard to the lack of any meaningful response to its enquiries or any attempt by the appellants to explain their position (then or earlier), it was clearly open to the MRT to regard the IELTS test form as a bogus document. There was no jurisdictional error in so doing, or in refusing visas on that ground.

36 36 Absence of jurisdictional error by the MRT rendered the application to the FCCA, and the present appeal to this Court, proceedings which could not succeed.

37 37 The appeal to this Court must therefore be dismissed with costs.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 20 May 2016